

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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CABLEVISION SYSTEMS NEW YORK CITY CORPORATION,

Plaintiff,

-against-

MICHAEL DIGESU

Defendant.

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**REPORT AND  
RECOMMENDATION  
TO THE HONORABLE  
DEBORAH A. BATTS**

01 Civ. 4296 (DAB) (FM)

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**FRANK MAAS**, United States Magistrate Judge. \_\_\_\_\_

I. Introduction

In this action, plaintiff Cablevision Systems of New York City Corporation (“Cablevision”) alleges that defendant Mike DiGesu (“DiGesu”) obtained cable programming services from Cablevision’s cable television system without authorization in violation of the Cable Communications Policy Act, 47 U.S.C. §§ 553(a)(1) and 605(a). On September 5, 2002, following DiGesu’s failure to respond to the complaint, Your Honor entered a Default Judgment and referred this matter to me to conduct an inquest regarding the damages, if any, to be awarded to Cablevision. (Docket No.7).

By order dated September 26, 2002, I directed Cablevision to serve and file an inquest memorandum on or before October 28, 2002, setting forth proof of its

damages, including costs and attorneys fees, as well as proposed findings of fact and conclusions of law. (Docket No. 9). DiGesu was given until November 11, 2002 to file opposition papers. (Id.). After these deadlines were extended, (Docket No. 10), Cablevision informed the Court, by letter dated January 9, 2003, that the parties had reached a settlement in principle. Accordingly, Cablevision withdrew its request for default damages without prejudice to its reinstatement in the event that the matter was not settled within 45 days.

After the parties were unable to effectuate a settlement, the matter was reopened (Docket No. 13), and DiGesu was given until March 27, 2003, to file his opposition papers. Despite his knowledge of the pendency of this action, which is confirmed by his attorney's participation in the settlement discussions, DiGesu has failed to file any opposition papers or contact the Court.

For the reasons set forth below, I recommend that Cablevision be awarded damages in the amount of \$10,540, consisting of statutory damages in the amount of \$10,000, attorney's fees in the amount of \$360, and \$180 in costs.

## II. Standard of Review

In light of DiGesu's default, Cablevision's well-pleaded allegations concerning issues other than damages must be accepted as true. See Cotton v. Slone, 4 F.3d 176, 181 (2d Cir. 1993); Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2d Cir. 1992); Time Warner Cable of New York City v. Barnes,

13 F. Supp. 2d 543, 547 (S.D.N.Y. 1998); Cablevision Sys. New York City Corp. v. Lokshin, 980 F. Supp. 107, 111 (E.D.N.Y. 1997).

Additionally, although a plaintiff seeking to recover damages against a defaulting defendant must prove its claim through the submission of evidence, the Court need not hold a hearing as long as it has (i) determined the proper rule for calculating damages on the claim, see Credit Lyonnais Secs. (USA), Inc. v. Alcantara, 183 F.3d 151, 155 (2d Cir. 1999), and (ii) the plaintiff's evidence establishes, with reasonable certainty, the basis for the damages specified in the default judgment. See Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F.3d 105, 111 (2d Cir. 1997); Fustok v. ContiCommodity Servs. Inc., 873 F.2d 38, 40 (2d Cir. 1993)(inquest on damages without hearing improper where based upon "single affidavit only partially based upon real numbers").

### III. Facts

The unrefuted allegations in Cablevision's complaint, together with its papers, establish the following:

Cablevision is a division of CSC Holdings, Inc., which is a Delaware corporation with its principal place of business at 1111 Stewart Avenue, Bethpage, New York, and an office located at 930 Soundview Avenue, Bronx, New York. (Compl. ¶ 4). Cablevision is franchised by the City of New York to operate cable television systems

within parts of the City of New York, including Bronx County where the defendant resides. (Id. ¶ 6).

At all relevant times, defendant DiGesu resided at 932 Logan Avenue, Bronx, New York. (Id. ¶ 5).

Cablevision offers four distinct tiers of programming services to its customers. (See Affidavit of Dennis E. Powers, sworn to on November 1, 2002 (“Powers Aff.”), ¶ 3). The fee for a “Basic” package, which provides subscribers with mostly broadcast programming, is approximately \$13 per month. (Id. ¶¶ 3-4). A “Family” package includes Basic programming plus some non-broadcast programming, such as ESPN and A&E, at a cost of approximately \$35 per month. (Id.). For a fee of \$80 per month, Cablevision subscribers can receive the full range of “premium” programming, including access to such channels as The Movie Channel, Showtime and Cinemax. (Id.). Finally, Cablevision offers “pay-per-view” programming, which allows subscribers to view special sporting events, concerts, and movies in exchange for a fee ranging from \$3.95 to \$54.95 per event. (Id. ¶ 5).

Cablevision receives the signals for some of its programming, including all of its premium and pay-per-view programming, though over-the-air transmissions from orbiting satellites and local radio towers. (Id. ¶ 9). In an effort to guard against the theft of its services, Cablevision generally encrypts, or “scrambles,” the signals for these premium and pay-per-view services. (Id.).

Cablevision customers who receive or intend to receive more than Basic programming are provided with programmable converter-decoders which unscramble only the programming that they have agreed to purchase and are authorized to receive. (Id. ¶¶ 8-10).

Despite this scrambling technology, an individual may illegally intercept Cablevision's signals through the use of a "pirate" cable television converter-decoder in his or her home or business. (Id. ¶ 14). In this case, records obtained by Cablevision during the course of a separate investigation involving Teleview/Omega Holdings, L.L.C.–JRC Products, Inc. ("Teleview") revealed that DiGesu purchased such a pirate descrambling device from Teleview in October 1995. (Id. ¶¶ 16, 21). DiGesu subsequently exchanged this device for another descrambling device in December 1996. (Id. ¶ 21).

DiGesu has continuously subscribed to Cablevision's Family service since December 18, 1991 at a rate of \$35 per month. (Id. ¶ 20). Through the use of a pirate device, however, DiGesu has had access to all of Cablevision's scrambled premium programming services as well as its pay-per-view services. (Id. ¶¶ 22, 25).

#### IV. Discussion

##### A. Statutory Damages

Sections 553<sup>1</sup> and 605<sup>2</sup> of Title 47 of the United States Code both prohibit the unauthorized interception and reception of cable programming services. Barnes, 13 F. Supp. 2d at 547-48 (citing Int'l Cablevision, Inc. v. Sykes, 75 F.3d 123, 133 (2d Cir. 1996)). The two statutes, however, are not coextensive. Section 553 applies only to cable transmissions while section 605 also applies to radio communications. Sykes, 75 F.3d at 133 (“Section 605 applies to a considerable body of radio transmissions to which § 553 is inapplicable while § 553 applies to any transmissions via cable, whether or not they originate as radio transmissions”); Lokshin, 980 F. Supp. at 112 (“In contrast to section 553, which by its statutory language applies only to transmissions via cable systems, section 605(a) applies to ‘the interception of cable-borne, as well as over-the-air, pay television’ where cable-borne transmissions originate as satellite transmissions.”). Accordingly, where, as here, programming is received via a satellite cable system, both statutes apply.

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<sup>1</sup> 47 U.S.C. § 553 (a)(1) provides, in pertinent part, that:

No person shall intercept or receive...any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.

<sup>2</sup> 47 U.S.C. § 605(a) provides, inter alia, that:

No person not being authorized by the sender shall intercept any radio communication and divulge or publish the...contents...of such intercepted communication to any person.

When a court determines that a defendant's conduct has violated both sections 553 and 605 of the Communications Act, a plaintiff may recover damages under one of those sections only. Sykes, 75 F.3d at 127; Barnes, 12 F. Supp. 2d at 548; Am. Cablevision of Queens v. McGinn, 817 F. Supp. 317, 320 (E.D.N.Y. 1993). An aggrieved cable operator may, however, elect to recover damages under Section 605 in light of its higher damages award. Barnes, 13 F. Supp. 2d at 548.

The Complaint in this case establishes that DiGesu installed an unauthorized "pirate" converter-decoder in his private residence for the purposes of descrambling Cablevision's encrypted premium and pay-per-view cable television signals. (Compl. ¶¶ 21-22; See also Powers Aff. ¶¶ 16-21). Furthermore, as a party possessing "proprietary rights" in the communications that DiGesu intercepted without authorization, Cablevision is an "aggrieved person" within the meaning of 47 U.S.C. §§ 553(c)(1) and 605(e)(3)(A).

Section 605 provides that a court may award an aggrieved person statutory damages of "not less than \$1,000 or more than \$10,000, as the court considers just." 47 U.S.C. § 605 (e)(3)(C)(i)(II). Here, Cablevision seeks to recover the \$10,000 maximum statutory damages allowable under section 605, plus attorney's fees and costs.

"The amount of damages to be awarded pursuant to Section 605 rests with the sound discretion of the court." Entertainment by J&J, Inc. v. Mama Zee Restaurant & Catering Services, Inc., 2002 WL 2022522, at \*3 (E.D.N.Y. May 21, 2002). Some courts have calculated statutory damages based upon the monthly value of a defendant's unauthorized cable reception. Lokshin, 980 F. Supp. at 113 (finding award of \$125 per

month for pilfered pay-per-view services to be reasonable); McGinn, 817 F. Supp. at 320 (imposing statutory damages of \$250 per month per unauthorized decoder); Time Warner Cable of N.Y. v. Rivera, 1995 WL 362429, at \*4 (E.D.N.Y. June 8, 1995)(Gold, Mag. J.)(recommending approximately \$1,000 in damages for eight months of pay-per-view usage). Other courts have simply imposed damages in a flat amount without explanation. See, e.g., Barnes, 13 F. Supp. 2d at 548 (awarding Time Warner Cable \$1,000 in statutory damages from each defendant).

Cablevision's submissions establish that DiGesu received a pirate converter decoder on October 18, 1995 and that the default judgment against him was entered on September 5, 2002. (Docket No. 7). During this time, DiGesu was authorized to view only channels included in Cablevision's Family package, a service for which he paid \$35 per month. (Powers Aff. ¶¶ 4, 20). Therefore, Cablevision is entitled to statutory damages for the illegal use of the converter-decoder calculated on the assumption that DiGesu misappropriated cable service for a period of 83 months . See, e.g., Cablevision Systems New York City v. Diaz, 2002 WL 31045855 (S.D.N.Y. July 10, 2002).

During this period, because the cost of obtaining all of Cablevision's premium services was approximately \$80 per month, DiGesu would have likely paid Cablevision \$6,640 (\$80 x 83 months) had he subscribed to those services. However, DiGesu in fact paid Cablevision only \$2,905 (\$35 x 83 months). Thus, Cablevision's



likely loss due to DiGesu's unauthorized access to premium programming is approximately \$3,735 (\$6,640 - \$2,905).

In addition, although it is unlikely that DiGesu would have viewed every available pay-per-view event, it is reasonable to assume he would have purchased at least three minimum cost events per month. See Diaz, 2002 WL 31045855 at \*4. This would have resulted in an additional monthly loss to Cablevision of \$11.85 (\$3.95 x 3) or a total of \$983.55 for the 83-month period during which DiGesu utilized the pirate decoder.

Thus, the total loss sustained by Cablevision due to the defendant's conduct is \$4,718.55 (\$3,735 + \$983.55). This sum, however, simply reflects "the amount that should have been paid" and, even if recovered from DiGesu, is unlikely to deter future illegal conduct of this kind. Time Warner Cable of N.Y.C. v. Domskey, 1997 WL 33374593 (S.D.N.Y. Sept. 2, 1999), at \*6. For this reason, courts have often doubled the damages awarded for the use of a pirate decoder. See Cablevision Systems of N.Y.C. Corp. v. Sencion, 2001 WL 1586685, at \*3; Domskey, 1997 WL 33374593 (S.D.N.Y.), at \*6. In this case, the resulting damages in the amount of \$9,437.10 are sufficiently close to the statutory maximum of section 605 that it is appropriate to award Cablevision \$10,000.

B. Attorneys' Fees

Section 605 authorizes a court to "direct the recovery of full costs, including the award of reasonable attorney's fees to an aggrieved party who prevails."

47 U.S.C. § 605(e)(3)(B)(iii). In this case, Cablevision alleges that it incurred attorneys' fees and costs in the amount of \$1,660 in the course of prosecuting this action. (See Aff. of Michael D. Cassell, Esq.)(“Cassell Aff.”), ¶ 1).

Of this amount, three tasks were billed at a flat rate rather than on a per-hour basis: the drafting of the complaint (\$300); the order to show cause for the default judgment (\$200); and the memorandum in support of the inquest (\$800). (Cassell Aff. ¶ 8). In addition, for its other work in connection with this case, Cablevision's counsel, the law firm of Lefkowitz, Louis & Sullivan, billed Cablevision on a per-hour basis. Michael Cassell, an attorney with seven years of experience, billed 1.10 hours at a rate of \$165 per hour for a total of \$181.50. Susan A. Wiendler, a paralegal with approximately ten months of experience, billed 2 hours at \$85 per hour for total of \$170; and Renee A. Delaon, a paralegal with two years of experience, billed .10 hours at \$85 per hour for an aggregate sum of \$8.50. Thus, in addition to the three tasks that were billed on a flat-fee basis, the attorneys and paralegals at Lefkowitz, Louis & Sullivan billed a total of \$360 (\$181.50 + \$170 + \$8.50).

Second Circuit precedent requires a party seeking an award of attorney's fees to support that request with contemporaneous time records that show “for each attorney, the date, the hours expended, and the nature of the work done.” New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1154 (2d Cir. 1983). Fee applications that do not contain such supporting data “should normally be disallowed.”

Id. at 1154. See also Kingvision Pay-Per-View v. The Body Shop, 2002 WL 393091 at \*5 (S.D.N.Y. Mar. 13, 2002)(Swain, J.)(denying attorney's fees because, even though requested amount of \$1,000 was reasonable, required details were not provided).

When fixing a reasonable rate for attorney's fees, courts may consider and apply prevailing market rates "for similar services by lawyers of reasonably comparable skill, experience, and reputation." Gierlinger v. Gleason, 160 F.3d 858, 882 (2d Cir. 1998)(quoting Blum v. Stenson, 465 U.S. 886, 895 n.11, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984)). Moreover, a court may rely on its own knowledge of private firm hourly rates in estimating reasonable attorneys' fees. Miele v. New York State Teamsters Conf. Pension and Ret. Fund, 831 F.2d 407, 409 (2d Cir. 1987).

In the present case, the \$360 billed by Lefkowitz timekeepers appears reasonable and should be awarded.

The remaining legal fees billed on a flat-rate basis should be disallowed. In Diaz, Judge Lynch adopted my recommendation to disallow a similar request because it failed to comply with the requirements of Carey. See Cablevision Sys. N.Y. City Corp. v. Diaz, 01 Civ. 4340 (S.D.N.Y. August 7, 2002). Blithely ignoring that decision, Cablevision has again sought to recover flat fees contrary to Carey. This request should be rejected.

### III. Costs

Cablevision also seeks to recover \$180 in costs, consisting of \$30 for process service and the \$150 fee for filing the summons and complaint. (Cassell Aff. ¶ 13). These charges are properly taxable as costs. See Local Civ. R. 54.1.

### V. Conclusion

For the reasons set forth above, I recommend Cablevision be awarded damages, including attorneys' fees and the costs incurred in prosecuting this action, in the amount of \$10,540 (\$10,000 + \$360 + \$180).

### VI. Notice of Procedure for Filing of Objections to this Report and Recommendation

The parties are hereby directed that if they have any objections to this Report and Recommendation, they must, within ten (10) days from today, make them in writing, file them with the Clerk of the Court, and send copies to the chambers of the Honorable Judge Deborah A. Batts, United States District Judge, at the United States Courthouse, 500 Pearl Street, New York, New York, 10007, and to the chambers of the undersigned, at the United States Courthouse, 500 Pearl Street, New York, New York, 10007, and to any opposing parties. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72(b). Any requests for an extension of time for filing objections must be directed to Judge Batts. Any failure to file timely objections will result in a waiver of those

objections for the purposes of appeal. See Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed. 2d 435 (1985); 28 U.S.C. § 636 (b)(1); Fed. R. Civ. P. 6(a), 6(e), 72(b).

Dated: New York, New York  
June 11, 2003

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FRANK MAAS  
United States Magistrate Judge

Copies to:

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